**Monark Boat Company *and* UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.** Cases 26-CA-8688, 26-CA-8866, 26-CA-8978, 26-CA-9004, 26-CA-9027, and 26-CA-9089

July 19, 1982

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On March 2, 1982, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

At issue is whether consideration of Respondent's application for an award of attorney's fees and expenses[1] filed on the 31st day after the entry of the Board's final order in the underlying unfair labor practice case is barred for jurisdictional reasons. The Administrative Law Judge recommended dismissal of the application on the grounds that it was untimely filed. For the reasons discussed below, we adopt his recommendation to dismiss the said application.

The relevant facts are as follows. On September 4, 1981,[2] the Administrative Law Judge issued a Decision recommending dismissal of the complaint in Case 26-CA-8978.[3] No party filed exceptions to his Decision. On October 6, in accord with Section 102.48(a) of the Board's Rules and Regulations, Series 8, as amended (hereinafter the Board's Rules), the Board automatically entered its final order adopting the Decision of the Administrative Law Judge. On November 5, Respondent mailed the instant application, and, on November 6 (31 days after the entry of the Board's final Order) the Board received the application.

EAJA, section 504(a)(2), provides that a party seeking attorney's fees and other costs "shall, within thirty days of a final disposition in the adversary adjudication, submit . . . an application" to the Board. As Congress by this statute relinquished the Government's immunity from suit, we must construe it strictly. *United States* v. *Sherwood*, 312 U.S. 584, 586, 590-591 (1941). We note that the statute uses the mandatory "shall," and makes no provision for exceptions or agency discretion. We further note that the legislative history of EAJA confirms that Congress intentionally drafted the 30-day period as a mandatory condition. The House Conference Report states that the Senate bill contained a provision (adopted by the House) which "*requires* a party seeking an award of fees and other expenses to submit an application for them within thirty days of final judgment."[4] H. Conf. Rept. 96-1434, 96th Cong., 2d sess. 26 (1980), reprinted in 5 U.S. Code Cong. & Ad. News 5015 (emphasis supplied); see also H. Rept. 96-1418, 96th Cong., 2d sess. 18 (1980), reprinted in 5 U.S. Code Cong. & Ad. News 4997. The above compels us to conclude that the 30-day period is a jurisdictional prerequisite which we cannot legally extend.[5]

Pursuant to section 504(c)(1) of EAJA, the Board issued procedural rules for the submission and consideration of applications for award. Section 102.148(a) provides that the jurisdictional time period begins to run from the date of the Board's final Order, and that an application must be "filed" no later than the 30th day after the entry of that order.[6] According to Section 102.114(b) of the Board's Rules, "filing" is accomplished when the Board receives the document to be filed.[7] Re-

[1] Pursuant to the Equal Access to Justice Act (hereinafter EAJA), 5 U.S.C.A. sec. 504 (1982).

[2] All dates hereinafter refer to 1981, unless otherwise indicated.

[3] During the hearing on the underlying unfair labor practice proceeding, the parties executed an informal settlement agreement resolving the issues arising from Cases 26-CA-8688, 26-CA-8866, 26-CA-9004, 26-CA-9027, and 26-CA-9089.

[4] Compare sec. 504(a)(2) and its legislative history with Sec. 10(c) of the National Labor Relations Act ("if no exceptions are filed within twenty days after service [of an administrative law judge's decision upon the] parties, *or within such further period as the Board may authorize*" (emphasis supplied)) and Sec. 10(b) and its legislative history ("The principal substantive change in this section is a provision for a 6-month *period of limitations* upon the filing of charges." S. Rept. No. 105, 80th Cong., 1st sess. 26 (1947), reprinted in I Leg. Hist., 432 (LMRA, 1947) (emphasis supplied)).

[5] Respondent cites several cases which stand for the proposition that, when a filing period expires on Sunday, filing on the following Monday is timely. We are unprepared to analogize those cases to the instant situation, where Respondent failed to file its application by a Tuesday. Reliance on *Zipes* v. *Trans World Airlines*, 50 LW 4238 (U.S. 1982), is also misplaced. *Zipes* did not involve statutes waiving sovereign community.

[6] Respondent does not dispute the definition of "final disposition in the adversary adjudication" as the date of entry of the Board's final Order, nor that the Board's final Order herein was entered on October 6.

[7] Respondent claims, in passing, that the use of "filed" is inconsistent with EAJA's use of "submit." If our holding that the 30-day period is jurisdictional is correct, then it would be inconsistent to define "submit" other than we define "filing." To interpret "submit" as "mailed" (as Respondent apparently urges us to do) would in effect modify the statute's jurisdictional prerequisite. As noted herein, it is impermissible for us to so modify our jurisdiction.

spondent argues that the Administrative Law Judge erred by not extending the filing period 3 days pursuant to Section 102.114(a) of the Board's Rules. The short answer to this argument is that, where Congress has set a jurisdictional condition, the Board cannot legally expand its jurisdiction. Thus, to tack on an additional 3 days in which EAJA applications could be filed would be an impermissible exercise of the Board's rulemaking authorization. In any event, Section 102.114(a) is not applicable. Under EAJA, a party must submit its application within 30 days of final judgment. The statute makes no mention of service. Section 102.114(a) is triggered only when a party's action must take place within a certain period "after service." Thus, here, since it is the entry of the Board's final order that marks the beginning of the filing period, rather than service of notice of final judgment, Section 102.114(a) is immaterial.

In sum, we find that the 30-day filing period is a jurisdictional prerequisite to application under EAJA. Because it is jurisdictional, we cannot legally extend the filing period beyond 30 days. Consequently, where an application fails to comply with the specified jurisdictional time period, this Agency is without jurisdiction to pass upon the merits of the application. Here, Respondent's application having been filed on the 31st day after final judgment, we are therefore compelled to dismiss said application for lack of jurisdiction.

## ORDER

It is hereby ordered that the application of Respondent, Monark Boat Company, Monticello, Arkansas, for an award under the Equal Access to Justice Act be, and it hereby is, dismissed.

## SUPPLEMENTAL DECISION

J. PARGEN ROBERTSON, Administrative Law Judge: This is a supplemental proceeding under the Equal Access to Justice Act (EAJA): Public Law 96-481-October 21, 1980; 94 Stat. (2321).

An application for an award of fees and expenses under the EAJA was filed by the Respondent, Monark Boat Company, with the National Labor Relations Board on November 6, 1981. A motion to dismiss was filed by the General Counsel of the National Labor Relations Board on January 6, 1982. Through its application, the Respondent claims fees and expenses which resulted during an unfair labor practice proceeding before the Board. I issued a Decision in that underlying unfair labor practice case on September 4, 1981. The deadline for filing exceptions to that decision expired on September 29, 1981, with no exceptions being filed. Therefore, in accord with its rules making adoption of the Administrative Law Judge's decision automatic, the Board issued its decision affirming dismissal of the General Counsel's complaint on October 6, 1981.

The General Counsel claims, in its motion to dismiss, that the application which was mailed on November 5 and received by the Board on November 6, 1981, was 1 day late and untimely.

The EAJA provides at section 504(a)(2) (5 U.S.C.A. sec. 504(a)(2) (1982)):

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section. . . .

The Board's Rules and Regulations, Series 8, as amended, specify at Section 102.148(a):

> An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding. The application for an award shall be filed in triplicate with the Board in Washington, D.C., together with a certificate of service. . . .

The procedure for computing time is provided in the Board's Rules and Regulations at Section 102.114(a):

> In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. For the purpose of this section a Saturday on which the Board's offices are not open for business shall be considered as a holiday, but a half holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served on him by mail or by telegraph, 3 days shall be added to the prescribed period: *Provided, however*, that 3 days shall not be added if any extension of such time may have been granted.

In a Decisions and Order which issued on November 25, 1981, in the matter of *G. W. Hunt d/b/a Foremost Foods Distributing*, 258 NLRB 1198, the Board held:

> Section 102.148 provides that the time limit for filing begins from the date of entry of the Board's final order.

It is apparent that application of the provisions of Section 102.114(a) of the Board's Rules would result in not

counting the date of the Board's Order—October 6—but counting the next day and all continuous days until the last of the 30 days, which would be November 5, 1981—a Thursday. The application was not received by the Board until the next day, November 6, 1981.

Although cited EAJA cases are rare, since its effective date was October 1, 1981, I note similarity between its provisions and a number of statutes providing for causes of action against United States' agencies. Moreover, there is a close similarity between the time computation provisions of the Federal Rules of Civil Procedure (6) and Section of 102.114(a) the Board's Rule (above).

The cases dealing with filing periods tend to strictly apply the time requirements (see *Texie G. Carr* v. *Veterans Administration*, 522 F.2d 1355, 1357 (5th Cir. 1975); *Ferd. Mulhens, Inc.* v. *Higgins*, 55 F.Supp. 42 (D.C.N.Y. 1943); *Wright & Miller, Federal Practice and Procedure: Civil § 1163 (1969); John Robinson Jr.* v. *Anthony J. Celebrezze, etc.*, 237 F.Supp. 115 (D.C.Tenn. 1964); *Daisy Zeller and Leslie Zeller* v. *Marion B. Folsom*, 150 F.Supp. 615 (D.C.N.Y. 1956)). In *Wyker* v. *Willingham*, 55 F.Supp. 105, 106 (D.C.Ala. 1944), a suit against the Collector of Internal Revenue, the court said:

> The United States can be sued only by its express consent. Where such permission is given, it is jurisdictional that the plaintiff comply with all conditions precedent and restrictions that are imposed upon the right to maintain the action. Such statutes constituting a relinquishment of the sovereign immunity from suit must be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058.
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> [4] Where, as here, a taxpayer permits the prescribed two year period after notice of rejection of his claim for refund to expire without beginning suit, neither the Commissioner of Internal Revenue has jurisdiction to extend the time for suit nor does the court have jurisdiction to entertain the suit. *First National Bank of Chicago* v. *United States*, 7 Cir., 102 F.2d 907; *United States* v. *Borg-Warner Corp.*, 7 Cir., 108 F.2d 424.
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> In the case of *A. G. Reeves Steel Construction Co.* v. *Weiss*, 6 Cir., 119 F.2d 472, 476, the court declared: "It is the definite policy of the Congress, gathered from the language of all the Revenue Acts, to prescribe periods of limitation for the exercise of the right to recover taxes which have accrued. Even the Government's inalienable legal right to taxes is restricted by a period of limitation in their assessment and collection. Statutes of limitation similarly control the rights of taxpayers and those who sleep on their rights may find themselves destitute of remedy. Only the vigilant will prevail."

The Respondent in its response brief to the motion to dismiss contends, among other things, that the provisions of Section 102.114(a) of the Board's Rules dealing with service by mail should be applicable. It argues under that provision, 3 additional days should be added.

The Board's *G. W. Hunt* case, *supra*, appears to hold to the contrary.

Federal Rules of Civil Procedure 6(e), contains a provision similar to the Board's Rules granting a 3-day extension in situations requiring service by mail. That Rule has been held not to extend the time permitted, where the applicant is seeking review of an administrative decision, on the theory that statutory time elements for review are mandatory and jurisdictional (*Wright & Miller, Federal Practice and Procedure: Civil § 1171 (1969); United States* v. *Easement and Right-of-Way*, 386 F.2d 769 (6th Cir. 1967), cert. denied 88 S.Ct. 1034; *Army and Air Force Exchange Service* v. *C. F. Hanson*, 250 F.Supp. 857 (D.C.Haw. 1966); *Robinson* v. *Celebrezze, supra; Zeller* v. *Folsom, supra; U.S. ex rel. T. V. A.* v. *72.0 Acres of Land, etc.*, 425 F.Supp. 929 (D.C.Tenn. 1976); *Carr* v. *Veterans Administration, supra; Eugene Whipp* v. *Casper Weinberger*, 505 F.2d 800 (6th Cir. 1974); *Davidson* v. *Secretary of Health, Education and Welfare*, 53 F.R.D. 270 (D.C.Okla. 1971)).

In *Mulhens, Inc.* v. *Higgins, supra*, the court held that where the United States is the genuine defendant (although the head of an agency was named), the applicable statute confers jurisdiction and must be strictly construed. In *United States ex rel. T. V. A.* v. *72.0 Acres of Land, supra*, the court applied Fed. R. Civ. P. 53(e)(2), upon determining that a formerly applicable statute had been repealed. The court, noting that rule 53(e)(2) includes the language "within 10 days after being served with notice . . ." determined that the 3 additional days' rule applied since the rule required receipt of a mailing. However, in *Army and Air Force Exchange Service* v. *Hanson, supra*, the court found the 3-day rule did not apply even though the applicable statute required service of the order by mail. See also *Carr* v. *Veterans Administration, supra*. In *Zeller* v. *Folsom, supra*, the court refused to apply the 3-day rule even though the statute provided action must commence within 60 days "after mailing." The court determined that the date of mailing, not receipt, applied and, under Fed. R. Civ. P. 82, it was powerless to extend the time since to do so would "extend or limit" its jurisdiction.

In *Robinson* v. *Celebrezze, supra*, 116, the court stated:

> The plaintiff, while admitting that the suit was not filed within the sixty day period as provided in 42 U.S.C. § 405(g), contends that Rule 6 (e), Federal Rules of Civil Procedure, allows three additional days by reason of mailing of the final decision of the Secretary of Health, Education and Welfare. In view of the fact that the sixty day limitation is a part of the statute creating a cause of action and vesting jurisdiction in this Court, the time limitation operates as a condition of jurisdiction and liability, and not merely a period of limitation. *United States ex rel. Rauch* v. *Davis*, 56 App.D.C. 46, 8 F.2d 907 (1925); *Pennsylvania Company for Insurances, etc.* v. *Deckert*, 123 F.2d 979 (C.A. 3rd, 1941); *Ewing* v. *Risher*, 176 F.2d 641 (C.A. 10th, 1949). Rule 6(e), Federal Rules of Civil Procedure, would have no application where jurisdiction of the Court does not attach by reason of the statutory period having run. *Zeller* v. *Folsom*, 150 F.Supp. 615 (D.C.N.Y., 1956); *Frost* v. *Ewing*, 13 F.R.D. 432 (D.C.W.D.Pa., 1953).

> The Court is of the opinion that the motion to dismiss must be granted.

The statute herein with the words "within thirty days of a final disposition in the adversary adjudication, "limits the jurisdiction of an EAJA action. That wording makes no allowance for mailing even though the Board regularly mails its decisions to the parties. The court in *United States* v. *Easement and Right-of-Way*, 386 F.2d 769, 771 (6th Cir. 1967), dealt with a similar question by citing the following language from District Judge Miller's underlying decision:

> Since the time limitation of twenty days is a part of this statute creating the cause of action and establishing jurisdiction in this Court, the time limitation operates as a jurisdictional condition as distinguished from a procedural limitation. See *Robinson* v. *Celebrezze*, 237 F.Supp. 115 (E.D.Tenn. 1964), and *Ewing* v. *Risher*, 176 F.2d 641 (10th Cir. 1949). For this reason, Rule 6(e), relating to procedural time periods, has no application. Rule 6(e) is also unavailable to the defendant for quite another reason. The rule provides for extension of time in situations where a party is required to "do some act or take some proceedings within a prescribed period after the service of a notice or other paper on him." Under the section in question, however, a party is required to file an exception on the *filing* of the Commissioners' award. Although the Clerk may send a copy of the award by mail, the Rule clearly contemplates situations in which actual service is offered by mail.

Moreover, the court, continuing to quote District Judge Miller, also resolved that mailing does not qualify as filing:

> Finally, defendant's contention that mailing of an exception constitutes filing is also without merit. The act of depositing the exception in the mail is not a filing. A filing takes place only when the Clerk acquires custody.

I find that the 30-day filing period runs from the date of the Board's Order without benefit of the 3-day mailing rule.

The Respondent also argues that this is an administrative proceeding and that the rules should be interpreted liberally. However, it is obvious that an administrative agency has no greater authority than the judicial courts to extend statutory jurisdiction (see *Wyker* v. *Willingham, supra*, 106).

The date of the Board's Order was October 6. The following day would be the first of the 30 days, and November 5 the last. The Respondent's November 6, 1981, filing is untimely. I recommend that the application be dismissed.

The General Counsel in his motion to dismiss also argues: (1) the application "is deficient in that it fails to demonstrate that Respondent meets all the eligibility requirements to apply for an award" under the EAJA; (2) the application "fails to fully document the fees and expenses"; (3) all fees and expenses sought "were incurred prior to October 1, 1981, the effective date of EAJA"; and (4) the underlying cases encompassed by the application were resolved prior to October 1, 1981, since a portion of those cases settled and no objections were taken to the settlement and the remaining case was litigated, decided, and the time for exceptions expired before October 1. Therefore, the General Counsel argues, even though the Board decision did not issue until October 6, the matter was actually finally resolved on September 29, 1981, the date when the time for filing exceptions expired; and the Respondent failed to demonstrate in its application, entitlement to fees and expenses arising from that portion of the underlying cases which settled. In view of my finding above, it is unnecessary for me to reach the above questions. Moreover, it appears those matters could, perhaps, be cured by amendments to the application or by the Administrative Law Judge ordering additional information if further proceedings are eventually directed. Therefore, I shall not consider those contentions.

## ORDER[1]

It is hereby ordered that the application be dismissed.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Supplemental Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Supplemental Order, and all objections thereto shall be deemed waived for all purposes.